

WRITTEN TESTIMONY OF MARILYN L. GLYNN
ACTING DIRECTOR AND GENERAL COUNSEL, OFFICE OF GOVERNMENT ETHICS
BEFORE THE COMMITTEE ON GOVERNMENT REFORM, SUBCOMMITTEE ON THE
FEDERAL WORKFORCE AND AGENCY ORGANIZATION
U.S. HOUSE OF REPRESENTATIVES
ON THE REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

MAY 23, 2006

Chairman Porter, Ranking Member Davis and Members of the Subcommittee:

My name is Marilyn Glynn, and I am Acting Director and General Counsel of the Office of Government Ethics. I am pleased to testify today concerning the reauthorization of OGE. As you know, OGE's current authorization expires on September 30, 2006. OGE is seeking a five year reauthorization. We therefore support the approach of H.R. 4701, which would authorize OGE through FY 2011.

OGE is a small agency, but we have a unique and crucial mission. Our organic act puts it succinctly: OGE is charged with the "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency." 5 U.S.C. app. § 402(a)(emphasis added). Although other agencies are involved in the enforcement of conflict of interest laws and regulations, OGE is the only agency whose fundamental statutory mission is to prevent conflicts. As I will describe in a few moments, OGE carries out its conflict prevention mission through many different functions.

History

Let me start with OGE's historical background. OGE was created by Congress, in Title IV of the Ethics in Government Act of 1978. At that time, Congress found that a central, expert ethics office was needed in the executive branch. This was in response to several related problems that had been identified, primarily through a series of General Accounting Office studies. See S. Rep. 170, 95th Cong., 1st Sess. 29-31 (1977). Three concerns, in particular, were noted:

First, with respect to standards of conduct, there was neither consistency nor credibility in interpretation or enforcement. Prior efforts by individual agencies, as well as

by the former Civil Service Commission, were compromised by the lack of any central interpretive or oversight authority.

Second, the existing financial disclosure systems were ineffective because of the absence of uniform procedures and oversight. Essentially, there was no central body with authority to ensure adequate collection and review of financial disclosure statements.

Third, there was a pattern of agencies permitting known conflicts of interest to persist for significant periods of time without corrective action. In the absence of any supervisory office that could press for an administrative resolution of conflicts, the ethics problems often lingered indefinitely.

To address all of these deficiencies, OGE was created to fill the need for a central, supervising office, whose mission and expertise is the prevention of conflicts of interest. This is not to say that there were no existing criminal sanctions for conflicts of interest; there were (and still are) criminal statutes that might have covered many of the types of conflicts identified in the 1970s. Nevertheless, a new focus on prevention of conflicts—through financial disclosure, better guidance, and administrative corrective action—was deemed a necessary complement to criminal enforcement. In part, this reflects an appreciation that criminal enforcement of conflict of interest laws can be a blunt instrument for some ethics matters, as well as a recognition that administrative prevention efforts can yield more extensive compliance than could be obtained solely through criminal enforcement. See, e.g., Robert G. Vaughn, Conflict-of-Interest Regulation in the Executive Branch 25-26 (1979).

Originally, OGE was made a part of the Office of Personnel Management. However, in connection with OGE's first reauthorization, in 1983, concerns were expressed in Congress concerning the need for OGE to exercise greater independence from OPM. See S. Rep. 59, 98th Cong., 1st Sess. 20-22 (1983). At that time, OGE was not removed from OPM, but it was granted greater authority to issue regulations directly (rather than through the Director of OPM), and it also was given a separate line item in the OPM budget. P.L. 98-150, §§ 3, 4, November 11, 1983. However, concerns about OGE's ability to operate independently of OPM were raised again during OGE's next reauthorization, in 1988. See H. Rep. 1017, Part 1, 100th Cong., 2d Sess. 16-18 (1988); S. Rep. 392, 100th Cong., 2d Sess. 10-12

(1988). This time, Congress removed OGE entirely from OPM. P.L. 100-598, § 3, November 3, 1988 (effective October 1, 1989).

Congress established OGE as a separate agency for several reasons. A primary purpose was to raise the visibility and stature of the ethics office, which had been "buried" within the OPM organization. Concerns also were expressed that, given the sensitivity of OGE's functions, it was important that the agency enjoy the necessary independence to make ethics decisions and report directly to the President, rather than through OPM superiors. Furthermore, OGE's administrative efficiency was impeded by being a part of a much larger organization: for example, OGE had to submit budgetary requests through the OPM hierarchy and, as one former director put it, "[b]ecause of OGE's small staff and budget, a small ripple in OPM's budget becomes a tidal wave when it impacts on OGE." H. Rep. 1017, at 16.

OGE now has operated for over a quarter century, including nearly two decades as a separate agency. OGE has been reauthorized four times, most recently in 2002 for a period of five years. P.L. 107-119, January 15, 2002.

Current Functions

OGE continues to perform the important conflict prevention functions for which it was originally created and later established as a separate agency.

A. Presidential Transitions

OGE plays an important role in the Presidential Transition process. Even prior to a Presidential election, candidates for President and Vice President file financial disclosure forms with OGE, which are reviewed by OGE for compliance with the law. During the period leading up to the Presidential election, OGE meets with representatives of each major party's candidate to brief them on a number of ethics matters. These briefings include information about the process for screening potential Cabinet and other appointees for conflicts of interest, the overall confirmation process, and the need to establish codes of conduct and operating procedures for transition team members. During the period between a Presidential election and the Inauguration of a new President, OGE works closely with transition team members to review the financial disclosure statements of prospective Cabinet nominees and resolve any potential conflicts of interest. After Inauguration, OGE turns

to the potential nominees for Senate-confirmed positions below the Cabinet level, a process that generally occupies the majority of OGE's time and attention for a substantial portion of the first year of an Administration. In 2001, for example, OGE certified 564 nominee reports and worked on approximately 100 other draft nominee reports.

B. Financial Disclosure and the Confirmation Process

During any year, not just Presidential transition periods, OGE reviews the financial disclosure statements of all nominees for Senate-confirmed positions to ensure that all potential conflicts of interest are identified and resolved. In FY 2005, OGE reviewed well over 300 nominee statements. In over 200 of these cases, OGE obtained specific ethics agreements from the nominees, committing them to take measures to resolve potential conflicts, such as divestiture, resignation, or recusal. OGE also reviews the annual and termination forms for all of these Presidential appointees. In FY 2005, for example, OGE reviewed a total of nearly 1500 financial disclosure statements from nominees, incumbents and terminating officials. OGE also responded in a timely manner to public requests for copies of over 1100 of these financial disclosure statements. OGE currently is working on a program to provide for electronic filing of financial disclosure statements.

C. Oversight of Executive Agencies

OGE engages in numerous activities to provide oversight of executive agencies. OGE's most formal oversight mechanism is the periodic audit of agency ethics programs, known as program reviews. These reviews examine in detail the systems agencies have in place for reviewing financial disclosure statements, providing ethics advice and training, cooperating with Inspector General offices, and other ethics program components. In FY 2005, OGE conducted evaluations of the ethics programs at 34 agencies, regional offices and military commands, as well as 16 follow-up reviews of programs that previously had received OGE recommendations for specific improvements. During FY 2005 and FY 2006, OGE worked with the Department of Health and Human Services to implement recommendations, including important new supplemental agency regulations, arising from an OGE program review focusing on the outside consulting activities of employees of the National Institutes of Health.

Other recent examples of OGE oversight include the development of an improved system for tracking compliance with

ethics agreements by Presidential appointees, and the development of an improved system to track consultations with agencies concerning waivers of the financial conflict of interest law, under 18 U.S.C. § 208(b). OGE also provides oversight in other, less formal ways, such as by contacting agency ethics officials and Inspector General offices to make sure that allegations of ethical misconduct by agency employees are taken seriously and addressed appropriately.

D. Ethics Regulations

OGE issues ethics regulations on a wide range of subjects, including: employee standards of conduct, public and confidential financial disclosure, financial conflict of interest, post-employment conflicts of interest, certificates of divestiture (a program to minimize the tax impact of ethics compliance), responsibilities of agency ethics officers, and ethics training requirements. For example, just this month, OGE issued a final rule to improve the confidential financial disclosure system, as well as a proposed new rule to clarify the standards of conduct applicable to detailees from non-Federal entities under the Intergovernmental Personnel Act. OGE also recently completed draft final regulations providing comprehensive guidance on the executive branch post-employment requirements of 18 U.S.C. § 207, and OGE is now working with the Department of Justice and other agencies to finalize this important rule. OGE also jointly promulgates agency-specific supplemental ethics regulations (such as the recent HHS regulations discussed above) and continues to work with a number of agencies to develop and promulgate their supplemental rules.

E. Written Guidance

One of the most important resources OGE provides to agencies and the public generally is a large body of written guidance concerning the application of the ethics laws and regulations. Each year, OGE publishes a number of advisory letters, which are written in response to specific questions posed by agency ethics officials, employees, Members of Congress, and the public. Additionally, OGE publishes "DAEOgrams," which are memoranda addressed to Designated Agency Ethics Officials and typically focus on a topic about which OGE has received a number of inquiries or which OGE perceives to be a source of interpretive difficulty among agency ethics officials. In recent years, for example, OGE published a comprehensive memorandum on post-employment conflicts, as well as a guide to ethics issues related to seeking non-Federal

employment, in which OGE emphasized, among other things, that agencies should issue conflict of interest waivers for employees negotiating for future employment only in compelling circumstances. In FY 2005, OGE also published a book-length "Reviewer's Reference," which provides detailed guidance to agency ethics officials on the review of public financial disclosure statements and the identification of potential conflicts of interest.

F. Liaison and Counseling for Agency Ethics Officials

OGE maintains an active outreach program to agency ethics officials. This includes a desk officer system that assigns designated OGE employees to provide prompt assistance to specific executive branch agencies. During FY 2005, OGE desk officers answered over 8000 inquiries from agency officials. Additionally, OGE attorneys are contacted frequently by agency officials for advice in applying the ethics requirements. In FY 2005, the Office of General Counsel and Legal Policy responded to over 2000 inquiries, mostly from agency ethics officials. During the same time, OGE expanded its e-mail Listserve, which provides updated ethics information to agency ethics officials and enforcement personnel, to include over 2300 recipients.

G. Training

In addition to promulgating regulations requiring agencies to provide ethics training to their employees, OGE actively develops training resources and conducts its own training. In FY 2005, OGE developed three ethics training programs for agencies to use with their employees, as well as two new instructor-led courses to train ethics officials. OGE also developed two new videos for use in training new agency ethics officials and new agency employees, and over 1200 duplicates of these items were requested and distributed. OGE directly provided training and advice to incoming and outgoing Presidential appointees, Schedule C's and noncareer SES. OGE presented its 14th Annual National Government Ethics Conference, which educated approximately 600 ethics officials from 94 executive departments and agencies, as well as two regional symposia, which were attended by approximately 160 officials. OGE also makes numerous presentations every year to outside organizations, such as professional associations and other non-governmental organizations, concerning Government ethics issues.

G. Focus on emerging issues

In light of its mission to direct overall executive branch policies for preventing conflicts of interest, OGE is uniquely positioned to focus on emerging ethics issues. In January of 2006, OGE issued a report to the President and Congress on the effectiveness of the criminal conflict of interest laws, including recommendations concerning improvements and emerging issues. In FY 2005, OGE issued a report to the President and Congress recommending improvements to the financial disclosure laws. OGE also testified before the Services Acquisition Advisory Panel to draw attention to new issues pertaining to conflicts of interest on the part of contractor personnel. OGE recently organized ethics officials from agencies involved in emergency response activities to work together in developing best practices for handling ethics issues that arise during emergency response situations. OGE currently is evaluating the impact of pay-for-performance and other alternative pay systems on the Federal ethics program, particularly the standards for determining which employees should be subject to financial disclosure requirements and certain post-employment requirements.

H. Liaison with Enforcement Community

Recognizing that enforcement, as a credible deterrent, is an important element in the prevention of conflicts of interest, OGE maintains an effective relationship with the enforcement community, including agency Inspectors General and the Department of Justice. At the formal level, OGE works with the IG community as a member of the President's Council on Integrity and Efficiency, as well as the Executive Council on Integrity and Efficiency. OGE also regularly participates in conferences, meetings, and training seminars for IG officials. In a less public, but no less important, role, OGE frequently provides assistance to IGs with respect to the application of the ethics laws and regulations in specific investigations. OGE also refers matters, including complaints and allegations, to IGs for evaluation and action as necessary. Where appropriate, OGE refers matters for civil or criminal enforcement to the Department of Justice. OGE also maintains a close liaison with the Public Integrity Section of the Criminal Division of DOJ, as well as with the Office of Legal Counsel at DOJ, in order to ensure consistent guidance with respect to the application of the conflict of interest laws.

I. International Anti-Corruption Efforts

In recent years, OGE has been called upon by U.S. foreign policy agencies to provide technical assistance to foreign governments regarding methods for preventing conflicts of interest, as part of broader anti-corruption efforts in these countries. In FY 2005, for example, OGE provided briefings to 37 delegations of foreign visitors totaling 287 individuals from 55 countries.

Reauthorization

OGE is seeking reauthorization for five years to continue these important conflict of interest prevention efforts. A five year authorization period would end in 2011, which would be the third year of a Presidential term. This would avoid the need for OGE to go through a reauthorization during the first or last year of a Presidential term, when OGE's resources are devoted in large part to matters arising from the election and transition. In the past, Congress has accommodated OGE's preference for this timing. See S. Rep. 88, 107th Cong., 1st Sess. 4 (2001).